

EXHIBIT E

To Motion In *Limine*
to Preclude Certain Opinion Testimony of Bruce E. Dale

Excerpts from transcript of 1/29/2007 trial testimony
of Bruce E. Dale

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United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES FIDELITY AND)	
GUARANTY COMPANY,)	
)	Plaintiff,
and)	CV-04-29-BLG-RFC
)	
)	VOLUME 6
CONTINENTAL INSURANCE COMPANY,)	TRANSCRIPT OF JURY TRIAL
Plaintiff Intervenor,)	
vs.)	
)	
SOCO WEST, INC., BRILLIANT)	
NATIONAL SERVICES, INC.,)	
STINNES CORPORATION, and)	
BRENNTAG (HOLDING) N.V.,)	
Defendants.))	
_____)	

BEFORE THE HONORABLE RICHARD F. CEBULL
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Monday, January 29, 2007
08:53:01 to 16:53:52

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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<p>1 APPEARANCES</p> <p>2 For the Plaintiff MR. JOHN I. GROSSBART</p> <p>3 USF&G: MR. ROBERT C. JOHNSON</p> <p>4 MR. M. KEITH MOSKOWITZ</p> <p>5 Attorneys at Law</p> <p>6 8000 Sears Tower</p> <p>7 233 South Wacker Drive</p> <p>8 Chicago, Illinois 60606</p> <p>9 MR. MARSHAL L. MICKELSON</p> <p>10 Attorney at Law</p> <p>11 P. O. Box 509</p> <p>12 Butte, Montana 59703</p> <p>13 For the Plaintiff MR. MAXON R. DAVIS</p> <p>14 Intervenor Continental: Attorney at Law</p> <p>15 P. O. Box 2103</p> <p>16 Great Falls, Montana 59403</p> <p>17 MR. BRIAN W. WALSH</p> <p>18 Attorney at Law</p> <p>19 405 Howard Street, Suite 600</p> <p>20 San Francisco, CA 94105</p> <p>21 For the Defendants: MR. THOMAS C. MIELENHAUSEN</p> <p>22 MR. CHRISTOPHER L. LYNCH</p> <p>23 Attorneys at Law</p> <p>24 4200 IDS Center</p> <p>25 80 South Eighth Street</p> <p>Minneapolis, Minnesota 55402</p> <p>MR. LAWRENCE B. COZZENS</p> <p>Attorney at Law</p> <p>550 North 31st Street, Suite 250</p> <p>Billings, Montana 59101</p> <p>Also present for MS. JULIANNE ROHM</p> <p>graphics display: MR. MIKE S. GREER</p> <p>REPORTER'S NOTE: "Uh-huh" and "Um-hmm" indicate</p> <p>affirmative responses. "Huh-uh" and "Hm-umm" indicate</p> <p>negative responses.</p>	<p>1 EXHIBITS</p> <p>2 For the Plaintiff and Plaintiff Intervenor: Received</p> <p>3 84 05/01/86 Warehouse meeting minutes 1308</p> <p>4 3200 Compilation: USF&G Policy No. SMP326188 1231</p> <p>5 3201 Compilation: USF&G Policy No. ICC599480 1232</p> <p>6 3202 Compilation: USF&G Policy No. SMP406309 1232</p> <p>7 3203 Compilation: USF&G Policy No. ICC944574 1232</p> <p>8 3204 Compilation: USF&G Policy No. CEP64280 1232</p> <p>9 3205 Compilation: USF&G Policy No. ICC945882 1231</p> <p>10 3206 Compilation: USF&G Policy No. CEP64348 1231</p> <p>11 3207 Compilation: USF&G Policy No. SMP535107 1231</p> <p>12 3208 Compilation: USF&G Policy No. SMP576121 1231</p> <p>13 3209 Compilation: USF&G Policy No. ICCA31253 1231</p> <p>14 3210 Compilation: USF&G Policy No. CEP84958 1231</p> <p>15 3211 Compilation: USF&G Policy No. SMP594660 1231</p> <p>16 3213 Compilation: USF&G Policy No. CEP104806 1232</p> <p>17 3214 Compilation: USF&G Policy No. SMP654057 1231</p> <p>18 3216 Compilation: USF&G Policy No. CEP114516 1231</p> <p>19 3217 Compilation: USF&G Policy No. SMP772986 1231</p> <p>20 3219 Compilation: USF&G Policy No. CEP114641 1232</p> <p>21 4027 Dyce site photo (D032604) 1282</p> <p>22 4072 Compilation: USF&G Policy No. SMP535107 1231</p> <p>23 4143 Dyce site photo 1450</p>
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<p>1 CONTENTS</p> <p>2 Proceedings 1228</p> <p>3 Defendants Rest 1240</p> <p>4 Motion of Plaintiffs 1382</p> <p>5 Order of Court 1384</p> <p>6 Volume 6 Reporter's Certificate 1469</p> <p>7</p> <p>8 WITNESSES</p> <p>9 For the Defendants:</p> <p>10 Mr. Larry Nelson (by deposition)</p> <p>11 Direct Examination by Mr. Cozzens 1235</p> <p>12 Cross-Examination by Mr. Mickelson 1238</p> <p>13 For the Plaintiff and Plaintiff Intervenor:</p> <p>14 Mr. Marvin Johnson (by videotape deposition)</p> <p>15 Examination by Mr. Ruggiero 1242</p> <p>16 Examination by Mr. Cromley 1314</p> <p>17 Examination by Mr. Ross 1321</p> <p>18 Reexamination by Mr. Ruggiero 1324</p> <p>19 Mr. Richard Brill (by videotape deposition)</p> <p>20 Examination by Mr. Ruggiero 1327</p> <p>21 Examination by Ms. Omvig 1359</p> <p>22 Examination by Mr. Ross 1360</p> <p>23 Reexamination by Mr. Ruggiero 1368</p> <p>24 Bruce Edwin Dale, Ph.D.</p> <p>25 Direct Examination by Mr. Davis 1371</p> <p>Cross-Examination by Mr. Lynch 1418</p> <p>Redirect Examination by Mr. Davis 1439</p> <p>Mr. Ken Kjos (by deposition)</p> <p>Direct Examination by Mr. Mickelson 1444</p>	<p>1 PROCEEDINGS</p> <p>2 (Open court.)</p> <p>3 (Jury not present.)</p> <p>4 THE COURT: Please be seated.</p> <p>5 Good morning. I hear that we have some issues on</p> <p>6 some exhibits?</p> <p>7 MR. MIELENHAUSEN: Yes, Your Honor. Before we close</p> <p>8 our case, we just want to basically load in the insurance</p> <p>9 policies. We have compiled a set of the policies from</p> <p>10 Exhibit 3200 through Exhibit 3219. We tried to come to a</p> <p>11 resolution about some objections that the insurance companies</p> <p>12 have raised. We're not able to do that.</p> <p>13 I learned this morning that they have some specific</p> <p>14 things that they have to do with these exhibits. Rather than</p> <p>15 get into all that, Your Honor, I think that the best way to do</p> <p>16 this is for us to load in what we believe are the policies and</p> <p>17 then, if the insurance companies have any additional changes</p> <p>18 or they believe there's some modifications, then they can load</p> <p>19 in their version of the exhibit. I think that's probably the</p> <p>20 best way to go.</p> <p>21 THE COURT: What do you mean, "their version"?</p> <p>22 Aren't they the same?</p> <p>23 MR. MIELENHAUSEN: They're claiming there are</p> <p>24 additional pages that should be in.</p> <p>25 MR. MOSKOWITZ: Right. There's a series of</p>

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1 could have made it to the northwest corner, to the hotspots as
2 indicated in the ROD?

3 A Yes, I do.

4 Q What is your opinion, Professor?

5 A Again, I don't think that any of it could have made it
6 out there. It evaporates too fast, it soaks in, and it would
7 have left a track.

8 Q Would there be any question in your mind as to the extent
9 of this -- can you explain to the jury the extent of change to
10 the loading area that would have been observable to just about
11 any person with their wits about them?

12 A Well, it would have been exposed to lots of perc for a
13 long period of time. There would have been perc left in any
14 low spots. Not all of it. Just -- you know, we've all seen
15 water run through ditches. Perc, again, is like water in that
16 sense. You don't just go by and nothing left, no residue of
17 liquid left. Plus, that, it's dissolved in the asphalt. It's
18 dissolved in a huge, working on a huge circumference or circle
19 area of asphalt and attacking it. It's a large spill so it's
20 spread out more. It's evaporating. You know, it just won't,
21 it just won't get up there 400 feet away.

22 Q But what's that loading area and unloading area look like
23 after 1,000 gallons of perc has been dumped in it, in the
24 facilities there?

25 A It's a mess. It's a huge mess. Every low spot has got

1 you can calculate the volume of air that that would fill up,
2 and then so by knowing the volume of air, you know the
3 diameter or the total distance over which a spill of perc of
4 that size would be, would be noticeable by people.

5 Q Did you do that for 500 gallons?

6 A Yes, I did.

7 Q And what does that translate?

8 A It's a hemisphere, a bowl, that's about a little over
9 1,000 feet in diameter from side to side. So it would fill up
10 a hemisphere, a bowl, if you will, of air that's 1,000 feet
11 across with perc at 50 parts per million.

12 MR. DAVIS: Mike, could you pull up, from the ROD
13 again, Exhibit 3059, page 118?

14 DOCUMENT TECHNICIAN: (Complied with request.)

15 MR. DAVIS: No, try 19. No, I think it was -- hard
16 to see. Go back to 18.

17 DOCUMENT TECHNICIAN: (Complied with request.)

18 BY MR. DAVIS:

19 Q Do you see a scale there in the lower right-hand corner
20 of that exhibit, Professor Dale?

21 A Yeah, I guess I do.

22 Q Okay. And can you see, can you locate the Brenntag
23 facility there?

24 A Yes.

25 Q Okay. Using that scale and using your index finger or

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1 perc in it, and in those low pots the asphalt is dissolved,
2 making it a tar, a gooey mess. If people go out there and
3 drive trucks through it, they'll see that the asphalt has been
4 destroyed. You'll see large areas of the gravel, the
5 aggregate exposed because the perc has flowed past it,
6 dissolved the asphalt and taken it away. I mean, it's not
7 possible that people wouldn't see that. It's not possible
8 that they wouldn't have observed that.

9 Q Let me return finally to another property of perc, which
10 is its odor. And let's go back to the 500-gallon spill. Is
11 there a way to calculate for the jury how noticeable a
12 500-gallon spill of perc would have been at the Dyce facility
13 back in the 1970s?

14 A In terms of its odor?

15 Q Yes.

16 A Yes, uh-huh.

17 Q You can calculate that?

18 A Yes, you can.

19 Q Explain.

20 A These are standard methods, but people can smell perc at
21 about 50 parts per million. That's 5/1,000ths of 1 percent.
22 So in air, 50 parts per million is 5/1,000ths of 1 percent,
23 and that's what you and I can smell.

24 Q So?

25 A Well, if you calculate 500 gallons of perc evaporating,

1 other digit of choice, can you give this jury a rough
2 approximation of how big an area around the Brenntag/Dyce
3 facility in which you'd have this sphere you've just described
4 where people would have been able to smell perc?

5 A Well, the scale is 100 feet. The whole distance there is
6 200 feet. So if you take that plus that -- sorry. Not doing
7 too great a job here.

8 This distance is roughly 200 feet. So double it to make
9 it 400 feet. And put that at the center of a, of a bubble
10 that would be -- I'm not doing this well.

11 It would be like that.

12 Q So anyone in that, that area you've drawn on this exhibit
13 would have been able to smell a 500-gallon perc spill at the
14 Dyce loading facility?

15 A Yes. Actually that area and probably more.

16 Q Let me go back to that loading and unloading area, and
17 let's assume someone has come on the scene and wants to, in
18 fact, cover up the spill and is trying to do something, such
19 as wash it with a garden hose or do something. With
20 500 gallons of perc, as they're standing there by this puddle,
21 what would you expect to have with the odor, the fumes coming
22 off?

23 A At 50 parts per million, people can smell perc pretty
24 easily. At a concentration 10 times that, 500 parts per
25 million, people start to get -- actually, more susceptible

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1 entered it, the perc wouldn't evaporate; isn't that correct?

2 A I'm sorry. Are you saying that the perc got to the water

3 up there in the northwest corner? It would sink through the

4 water, and it would not evaporate, that's right.

5 Q Now you talked about also your calculations regarding the

6 odor of perc and how far of an area that would extend. What

7 were you assuming the wind speed to be?

8 A In that case, I was assuming zero wind speed.

9 Q Zero wind speed.

10 A (Nodded head affirmatively.)

11 Q Have you ever -- strike that.

12 Is that a realistic assumption for outdoors, Billings,

13 Montana, that there's going to be no wind?

14 A In the area immediately by the warehouse, because it's

15 somewhat protected from the wind, I think that that is closer

16 to being the truth than it is to be a high wind speed. But,

17 no, I mean, Billings has -- this is near the mountains. We

18 have wind, and so there is always some wind.

19 Q And that's why, for your evaporation calculation, you

20 used 9 miles an hour?

21 A Right.

22 Q Yet for your odor calculation, you chose no wind?

23 A Well, that's one of the illustrations I did, that's

24 right.

25 Q Do you know which way the prevailing winds are in this

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1 area?

2 A They come from the west, generally.

3 Q The west, generally.

4 I'd like to introduce a proposed illustrative exhibit.

5 MR. DAVIS: Well, not seeing it, I'd object on

6 foundation.

7 THE COURT: I haven't seen it.

8 MR. LYNCH: (Handing.)

9 MR. DAVIS: (Handing.)

10 THE COURT: I'll turn the jury screen off. Just put

11 it up there.

12 MR. LYNCH: Actually we don't have it on the screen,

13 Your Honor.

14 THE COURT: Put it on the DOAR there.

15 THE CLERK: (Complied with request.)

16 MR. DAVIS: That's fine.

17 (Pause.)

18 THE CLERK: Do you want me to go through it? Is

19 there a certain page?

20 THE COURT: Let me see it. You don't have to -- oh,

21 okay.

22 THE CLERK: (Handing.) It's pretty lengthy.

23 MR. LYNCH: It's from a government website, Your

24 Honor.

25 MR. DAVIS: I object to counsel --

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1 MR. LYNCH: Self-authenticating.

2 MR. DAVIS: I object to counsel trying to do what

3 I've objected to.

4 (Pause.)

5 THE COURT: Oh, let's have a sidebar.

6 (Discussion on the record at sidebar.)

7 THE COURT: What is it? It says "Free Copy,

8 Climatic Wind Data for the U.S. through 1996." From when to

9 1996?

10 MR. LYNCH: It's from -- it should say on the front

11 page, I believe, Your Honor.

12 THE COURT: I didn't see it.

13 MR. LYNCH: 1930 to 1996.

14 THE COURT: 1930 to 1996.

15 MR. LYNCH: And it's from a government website,

16 self-authenticating.

17 THE COURT: What are you going to do with it?

18 MR. LYNCH: Just show that the prevailing winds in

19 Billings are from the southwest, blowing away from the

20 facility.

21 THE COURT: What do you -- I mean, are you going to

22 use this as a reliable treatise under the rules of evidence,

23 or are you going to use it as some kind of official

24 government -- why are you going to use it?

25 MR. LYNCH: As an official government brochure,

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1 issued by the government.

2 THE COURT: I don't think the rule covers -- what do

3 the rules cover? I mean, why can't you say, "If I told you

4 the" -- I mean, who is it kept by?

5 MR. LYNCH: U.S. Department of Commerce, National

6 Oceanic and Atmospheric Association.

7 THE COURT: I mean, you know, if it's a reliable

8 treatise, you can use it in evidence, put it in evidence, but

9 the jury doesn't get to take it with them. But he's got -- I

10 don't know if he'll admit and say it's a reliable treatise

11 that he relied on. Doesn't sound like it.

12 MR. DAVIS: The only one authenticating this is

13 counsel. I'm not saying he's a liar, but I can't tell if it

14 came from the government or not.

15 THE COURT: That's what it says.

16 MR. DAVIS: That's great. I've got a word

17 processor, too.

18 THE COURT: I'm not going to allow you to put it in,

19 but ask him if he'd argue if you've seen climatological data

20 from the government that says the predominant wind is from the

21 southwest. Is that what you're trying to get at?

22 MR. LYNCH: Yeah.

23 THE COURT: Do it that way.

24 (Open court.)

25 (Jury present.)